

# Third Circuit Strikes Another Blow Against the FTC's Preferred Enforcement Power, Setting the Stage for a Supreme Court Showdown

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On September 30, 2020, the Third Circuit reversed a district court decision ordering two healthcare companies to pay \$448 million for allegedly anticompetitive behavior, holding that Section 13(b) of the Federal Trade Commission Act ("FTCA") does not give the Federal Trade Commission ("FTC") the authority to obtain monetary remedies in federal court.<sup>1</sup>

This is the latest decision highlighting a circuit split on the question of whether the FTC may obtain equitable disgorgement or restitution in suits under Section 13(b) of the FTCA. The FTC's claims sound in antitrust, but the FTC also relies on Section 13(b) in consumer protection cases alleging unfair or deceptive practices. Accordingly, limitations on the FTC's ability to obtain monetary remedies pursuant to Section 13(b) could have a significant impact on FTC false advertising and privacy/cybersecurity investigations. This circuit split should be resolved next year when the Supreme Court considers two consolidated cases addressing the same issue, *FTC v. Credit Bureau Center LLC* and *AMG Capital Management LLC v. FTC*.

**Challenges to the FTC's Interpretation of Section 13(b).** For the past 30 years, the FTC has relied on Section 13(b) of the FTCA to obtain a wide range of "equitable remedies," including equitable restitution (i.e., money to compensate consumers for harm arising from unfair and deceptive acts and practices found to violate Section 5 of the FTCA) and disgorgement of profits. Section 13(b) does not expressly authorize monetary remedies (including disgorgement or restitution), but most courts over the last several decades have taken the position that the FTC's authority to obtain monetary relief is implied as an inherent equitable remedy. This enforcement mechanism has enabled the FTC to recover billions of dollars in restitution/d disgorgement (also referred to by the FTC as "consumer redress").

Recent judicial decisions, however, have challenged the FTC's expansive, extra-textual interpretation of Section 13(b). The two cases the Supreme Court will consider this

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<sup>1</sup> See <https://www2.ca3.uscourts.gov/opinarch/182621p.pdf>. Debevoise & Plimpton LLP acts as counsel to a party in this case on unrelated matters.

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term illustrate the legal challenges confronting the FTC. As we reported in a “Debevoise In Depth” piece,<sup>2</sup> the Seventh Circuit in 2019 held in *FTC v. Credit Bureau Center LLC*<sup>3</sup> that the FTC could not obtain monetary relief for FTCA violations regardless of whether the monetary relief is characterized as restitution, disgorgement, or consumer redress. In contrast, the Ninth Circuit in *FTC v. AMG Capital Management LLC*<sup>4</sup> upheld a \$1.3 billion award, but only to avoid overruling its own precedent—two of the three panel members joined a special concurrence arguing that this position is “no longer tenable,” stating that “the text and structure of [the FTCA] unambiguously foreclose such monetary relief.”

The Third Circuit’s recent decision strikes a fundamental blow at the FTC’s enforcement regime, particularly in reverse payment cases where the Third Circuit has been the FTC’s venue of choice. The Third Circuit agreed with its prior precedent that limits the FTC’s ability to obtain injunctive relief at all and with the Seventh Circuit’s holding in *Credit Bureau* that monetary remedies under Section 13(b) are prohibited.

More specifically, the Third Circuit agreed with the legal reasoning in its prior decision in *FTC v. Shire ViroPharma, Inc.*,<sup>5</sup> which held that the FTC lacks the authority to bring injunctive actions at all under Section 13(b) for violations of the FTCA that are not imminent or ongoing.<sup>6</sup> In fact, the Third Circuit rejected the FTC’s request to enjoin the defendants from engaging in similar conduct in the future, upholding the lower court ruling against an injunction because the commission had not shown the alleged conduct was likely to recur.

In addition, the Third Circuit also held that Section 13(b) of the FTCA does not grant federal courts the power to order disgorgement. In reaching this decision, the court acknowledged the validity of many of the same arguments put forth by the Seventh Circuit in *Credit Bureau*. The court also identified an additional argument that combines the logic of *Shire ViroPharma* with that of *Credit Bureau*. Specifically, the Third Circuit reasoned that “[i]f Congress contemplated the FTC could sue for disgorgement under Section 13(b), it probably would not have required the FTC to show an imminent or ongoing violation” because “[d]isgorgement deprives a wrongdoer of *past gains*.” This statutory inconsistency supported the court’s conclusion that monetary remedies are not authorized by the overall statutory scheme created by Congress in the FTCA.

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<sup>2</sup> Debevoise In Depth: Seventh Circuit Strikes a Blow Against the FTC’s Preferred Enforcement Power (Aug. 28, 2019), <https://www.debevoise.com/insights/publications/2019/08/seventh-circuit-strikes-a-blow-against-the-ftc>.

<sup>3</sup> *FTC v. Credit Bureau Center LLC et al.*, No. 18-3310 (7th Cir. 2019).

<sup>4</sup> *FTC v. AMG Capital Mgmt. LLC*, 910 F.3d 417 (9th Cir. 2018).

<sup>5</sup> *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

<sup>6</sup> See Debevoise Update: The Third Circuit Sharply Curtails the FTC’s Preferred Enforcement Power (Mar. 1, 2019), [https://www.debevoise.com//media/files/insights/publications/2019/03/20190301\\_the\\_third\\_circuit\\_sharply\\_curtails\\_the\\_ftcs\\_preferred\\_enforcement\\_power.pdf](https://www.debevoise.com//media/files/insights/publications/2019/03/20190301_the_third_circuit_sharply_curtails_the_ftcs_preferred_enforcement_power.pdf).

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The Third Circuit decision comes on the heels of the June 22, 2020 Supreme Court decision in *Liu v. SEC*,<sup>7</sup> a case dealing with the authority of the Securities and Exchange Commission (“SEC”) to pursue disgorgement for a securities violation in federal court. As explained in our “Debevoise In Depth” piece, the Supreme Court held that disgorgement may be obtained as equitable relief under the SEC Act only if it is not a penalty, does not exceed a wrongdoer’s net profits, and is awarded to provide relief to consumers. Unlike the FTCA, however, the SEC Act authorizes the SEC to obtain “equitable relief,” whereas Section 13(b) of the FTCA only authorizes a preliminary or permanent injunction (and does not mention equitable relief at all).<sup>8</sup> In other words, there is an even stronger argument that Section 13(b) of the FTCA does not authorize disgorgement or restitution.

**Implications of the Upcoming Supreme Court Case Addressing Whether Section 13(b) of the FTCA Authorizes Equitable Disgorgement or Restitution.** In briefs filed with the Supreme Court for the upcoming case, the FTC argues that a federal court’s authority under Section 13(b) to award a permanent injunction includes the inherent equitable authority to award restitution, disgorgement, and other forms of monetary relief. The agency argues that Congress would have been aware of the inherent power of a federal court to grant complete equitable relief, including monetary relief, when entrusting a court with enforcement power under Section 13(b). Credit Bureau and AMG argue, on the other hand, that the plain text of the statute clearly states that Section 13(b) only allows for injunctive relief where a party “is violating, or is about to violate” the FTCA, and that Congress clearly opted not to grant the FTC the ability to obtain monetary relief under this provision. Credit Bureau and AMG also argue that Congress expressly authorized monetary relief in other sections of the FTCA that provide greater procedural protections for industry, further supporting the conclusion that Congress made an informed judgment in deciding against the grant of such authority in Section 13(b) cases.

Credit Bureau and AMG may find a receptive audience in the Supreme Court, where a majority of justices may be skeptical of agency overreach and find the plain text statutory argument compelling. That said, it is difficult to predict whether the Court will strike monetary remedies entirely, limit them as in *Liu*, or maintain some version of the status quo.

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<sup>7</sup> *Liu v. SEC*, 591 U.S. \_\_\_\_ (2020).

<sup>8</sup> See Debevoise In Depth: Supreme Court *Liu* Decision Upholds SEC Disgorgement Power While Suggesting Potential Limits, and May Impact FTC Enforcement (June 23, 2020), <https://www.debevoise.com//media/files/insights/publications/2020/06/20200623-supreme-court-liu-decision-upholds-sec-di.pdf>.

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If the FTC can no longer obtain equitable monetary remedies under Section 13(b), in order to obtain monetary remedies in typical consumer protection cases<sup>9</sup> the FTC will be limited to a two-step process authorized by separate provisions in the FTCA. Specifically, the FTC must first bring a successful administrative action and then bring a follow-on action in federal court where penalties or other equitable relief are authorized only if the FTC can establish that a reasonable person would have known that the underlying activity was “dishonest or fraudulent.” Such cases have been rarely pursued by the FTC as they require the use of significant agency resources, and the “dishonest or fraudulent” standard established by Congress is challenging to prove.

If the Supreme Court rules against the FTC, the agency will likely double down on efforts to have Congress expressly grant it the ability to proceed directly to federal court to obtain monetary relief. Whether this is a realistic goal may depend on the upcoming election, the composition of Congress, and other competing legislative priorities. The FTC has sought this authority for many years, thus far without success.

Even if Congress grants the FTC the authority to obtain monetary remedies pursuant to Section 13(b) at some point in the future, it could add significant statutory constraints that limit the FTC’s enforcement options. For example, as in Section 19 of the FTCA, Congress could limit equitable monetary relief to circumstances in which a reasonable person would have known that the underlying activity was dishonest or fraudulent.

Until the Supreme Court issues its opinion, any company subject to an FTC investigation should keep the circuit split and upcoming decision in mind when negotiating with the agency. Before courts began limiting the FTC’s authority under Section 13(b), the vast majority of companies confronting litigation with the FTC settled their cases to either avoid or limit the amount of monetary relief. For companies currently under investigation, the upcoming Supreme Court decision provides a basis to resist settlements that include monetary relief when negotiating with the FTC. In less than a year, companies may confront a vastly different power dynamic.

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Please do not hesitate to contact us with any questions.

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<sup>9</sup> Certain consumer protection statutes enforced by the FTC expressly authorize civil penalties, and penalties may also be obtained for violation of an existing cease-and-desist order.

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